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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In The Matter of APPLICATION OF AMERITECH MICHIGAN PURSUANT TO SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996 TO PROVIDE IN-REGION, INTERLATA SERVICES IN MICHIGAN	CC Docket No. 97-137

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OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a trade association representing more than 500 entities engaged in, or providing products and services in support of, telecommunications resale, hereby respectfully urges the Commission to deny the Application of Michigan Bell Telephone Company d/b/a Ameritech Michigan for authority to provide, through its affiliate Ameritech Communications, Inc., interLATA service "originating" within the Ameritech Michigan "in-region State" of Michigan. Ameritech has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company provision of "in-region," interLATA service, but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C). Among the deficiencies which undermine the Ameritech Michigan Application and preclude its grant are the following:

- Ameritech Michigan has not satisfied the threshold requirements of Section 271(a)(1) because none of the three competitive LECs upon whose network interconnection/access agreements it relies serve a sufficient quantity of residential and business customers and do so at least predominantly over their own facilities.

- Ameritech Michigan has not fully implemented the 14-point "competitive checklist" given that its operations support systems are not fully tested and operational, it does not provide unbundled local switching and it has not demonstrated that its rates and charges for unbundled network elements are cost-based and that its wholesale prices reflect reasonably avoidable costs.

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OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Public Notice, DA 97-1072 (released May 21, 1997), hereby opposes the application ("Application") filed by Michigan Bell Telephone Company d/b/a Ameritech Michigan ("Ameritech Michigan") under Section 271(d) of the Communications Act of 1934 ("Communications Act"),[1] as amended by Section 151 of the Telecommunications Act of 1996 ("Telecommunications Act")[2] for authority to provide, through its wholly-owned affiliate Ameritech Communications, Inc. ("ACI"), interLATA service "originating" within the Ameritech Michigan "in-region State" of Michigan.[3] As TRA will demonstrate below, Ameritech Michigan

1 47 U.S.C. § 271(d).

2 Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

3 An "in-region State" is "a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 271(i)(1).

has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company ("BOC") provision of "in-region," interLATA service,[4] but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C).[5] Given that the Commission cannot, therefore, make the affirmative findings required by Section 271(d)(3), TRA submits that the Ameritech Michigan Application cannot be granted. TRA, accordingly, urges the Commission to deny Ameritech Michigan the "in-region," interLATA authority it seeks here.

I.

INTRODUCTION

A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier

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[4] 47 U.S.C. § 271(c).

[5] 47 U.S.C. § 271(d)(3)(C).

("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks." TRA's resale carrier members, accordingly, will not only be direct competitors of Ameritech Michigan, ACI and other Ameritech Michigan affiliates in the local exchange, long distance and other markets, but will be reliant upon Ameritech Michigan as an incumbent LEC for wholesale services and access to unbundled network elements, as well as for exchange access services.

TRA's interest in this matter is in protecting, preserving and promoting competition within the interexchange market, as well as in speeding the emergence and growth of resale, non-facilities-based, and ultimately facilities-based competition in local exchange/exchange access markets within the State of Michigan and elsewhere.[6] Permitting premature entry by any of the BOCs, including Ameritech Michigan, into the "in-region," interLATA market would jeopardize the vibrant and dynamic competition that now characterizes the interexchange market, and retard the emergence and development of competitive local exchange/exchange access markets. As the Commission has recognized, there are a host of ways in which control of local exchange/exchange "bottlenecks" can be leveraged by the BOCs and other incumbent LECs to disadvantage interexchange carrier rivals, particularly if interstate access charges remain at their current inflated levels.[7] The Commission has further recognized that the BOCs and other

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[6] TRA has been an active participant in Case No. U-11104 before the Michigan Public Service Commission ("MPSC"), In the Matter of, on the Commission's own Motion, to Consider Ameritech Michigan's Compliance with the Competitive Checklist in Section 271 of the Telecommunications Act of 1996.

[7] *See, e.g.,* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, CC Docket No. 96-149, FCC 96-489 ¶¶ 7 - 13 (released Dec. 24, 1996),
[footnote continued on next page]

incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local telecommunications market.[8]

[footnote continued from preceding page]

pet. *for rev. pending sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Jan. 31, 1997), *recon. pending* ("Non-Accounting Safeguards Order"). As described by the Commission:

> If a BOC is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly allocated to its competitive ventures. . . . In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive. . . . Moreover, if a BOC charges other firms for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a 'price squeeze.' In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions. This artificial advantage may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer. Unlawful discriminatory preferences in the quality of the service or preferential dissemination of information provided by BOCs to their section 272 affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service . . . the BOC could effectively create the same 'price squeeze' discussed above.

Non-Accounting Safeguards Order, CC Docket No. 96-149, FCC 96-489 at ¶¶ 10 - 12 (footnotes omitted).

[8] *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶¶ 10 - 23 (released August 8, 1996), *pet. for rev. pending sub nom.* Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996), *further recon. pending* ("Local Competition First Report and Order"). Among other things, the Commission has noted:

[footnote continued on next page]

As the Commission has acknowledged, monopolists do not readily relinquish market power; theoretically "contestable" markets cannot be miraculously transformed into actually "contested" markets overnight.[9] Unless there exists a potent countervailing incentive or disincentive to do otherwise, it can be anticipated that the BOCS, including Ameritech Michigan, and other incumbent LECs will actively seek to forestall local exchange/exchange access competition as a profit maximizing strategy. And given past practices, it can also be anticipated that the BOCS, including Ameritech Michigan, and other incumbent LECs will utilize their "bottleneck" control of exchange access facilities to disadvantage interexchange competitors.[10]

TRA submits that BOC and other incumbent LEC market conduct will be adequately disciplined only when viable facilities-based competition has emerged in the local exchange/exchange access market and that the only incentive that may be strong enough to

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> An incumbent LEC . . . has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers. . . . Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. . . . This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be fair opportunity to compete in the local exchange and exchange access markets.

Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶¶ 11, 16, 17.

[9] *See, e.g.,* id.

[10] *See, e.g.,* United States v. Western Electric Co., 767 F.Supp. 308, 322 (D.D.C. 1991) ("Where the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct . . .").

motivate the BOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services. As Richard Notebaert, the Chief Executive Officer of Ameritech, candidly noted:

> The big difference between us and [the GTE] is they're already in long distance. What's their incentive to cooperate.[11]

The Commission has reached a like conclusion:

> We find that incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act,* to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services.[12]

Hence, the public interest would not be served by sanctioning origination of interLATA traffic by Ameritech Michigan within the "in-region State" of Michigan until the bulk of the residents of the State can select among multiple facilities-based providers of local exchange/exchange access service. In other words, Ameritech Michigan should not be awarded the authority it seeks here until it is facing viable facilities-based competition in at least the major population centers within the State of Michigan. Certainly, Ameritech should not be granted such authority until it has fully satisfied the "competitive checklist;" the relaxed "competitive checklist" compliance standards advocated by Ameritech should be summarily rejected.

The Commission has an opportunity to realize the Congressional vision reflected in the Telecommunications Act of an integrated, fully competitive telecommunications

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[11] "Holding the Line on Local Phone Rivalry," The Washington Post, pp. C-12, C-14 (Oct. 23, 1996).

[12] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 55 (emphasis added).

marketplace. That opportunity should not be lost by simply giving away the "carrot" relied upon by Congress to prompt "the opening [of] all telecommunications markets to competition."[13]

II.

ARGUMENT

A. Procedures for Reviewing BOC Applications for "In-Region," InterLATA Authority Under Section 271

Within ninety days following submission by a BOC of an application to provide interLATA services originating (or in the case of inbound and private line services, terminating) within a State in which the BOC provides local exchange/exchange access service as an incumbent LEC, the Commission must issue a written determination approving or denying the application.[14] In undertaking that review, the Commission must consult with, and give "substantial weight" to the recommendations of the U.S. Department of Justice;[15] the Commission must also consult with the telecommunications regulatory authority of the State that is the subject of the BOC application to verify the compliance of the applying BOC with the requirements for providing "in-region," interLATA services set forth in Section 271(c).[16]

The Commission may not grant a BOC application for "in-region," interLATA authority unless it makes an affirmative determination that the applying BOC has met the requirements of Section 271(c)(1) and (2) for the State for which authorization is sought,

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[13] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Joint Explanatory Statement").

[14] 47 U.S.C. § 271(d)(3).

[15] 47 U.S.C. § 271(d)(2)(A).

[16] 47 U.S.C. § 271(d)(2)(A).

including: (i) a showing that either the BOC is providing, pursuant to one or more binding agreements approved by the State Commission under Section 252, access and interconnection to its facilities for the network facilities of an unaffiliated competitor that is providing telephone exchange services to residential and business subscribers exclusively or predominantly over its own landline telephone exchange service facilities, or, if no such unaffiliated facilities-based competitor has requested such network access and interconnection, the BOC is offering to provide such access and interconnection pursuant to a Statement of Generally Available Terms and Conditions ("SGATC") approved or permitted to take effect by the State Commission, and (ii) a demonstration that it has fully implemented in one or more access and interconnection agreements with facilities-based competitors or offered in a SGATC all fourteen items included on the "competitive checklist."[17] For the Commission to determine that an RBOC has fully satisfied the 14-point "competitive checklist," the BOC must have provided competitive LECs with (i) physical interconnection of network facilities at cost-based rates, (ii) nondiscriminatory access at cost-based rates to unbundled network elements, including local loop, local transport, local switching, and database and associated switching, as well as to poles, ducts, conduits and other rights of way, 911 and E911 service, directory assistance, operator call completion services and white pages directory listings, (iii) viable interim telecommunications number portability, (iv) local dialing parity, (v) reciprocal compensation arrangements, and (vi) opportunities to resell all retail service offerings at wholesale rates reflective of reasonably avoidable costs.[18]

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[17] 47 U.S.C. §§ 271(c), 271(d)(3)(A).

[18] 47 U.S.C. § 271(c)(2)(B).

Before granting a BOC application for "in-region," interLATA authority, the Commission must further make an affirmative determination that any authorization it grants to the applying BOC will be carried out in accordance with the structural and transactional requirements, nondiscrimination safeguards, audit obligations and marketing restrictions set forth in Section 272.[19] And critically, the Commission must find that grant of the requested in-region authority is consistent with the public interest, convenience and necessity.[20]

B. The Ameritech Michigan Application Fails to Satisfy the Threshold Requirements of Section 271(c)

Section 271(c)(1)(A)'s "Track A" provides for satisfaction of the initial element of the first criterion for grant of an BOC "in-region," interLATA application if one or more of the network access and interconnection agreements entered into by the BOC is (i) binding and approved by the pertinent State Commission and is with an entity providing service (ii) to residential and business subscribers, and doing so (iii) exclusively over its own telephone exchange service facilities, or at least (iv) predominantly over such facilities.[21] Ameritech

[19] 47 U.S.C. §§ 271(d)(3)(C); § 272.

[20] 47 U.S.C. § 271(d)(3)(C).

[21] As TRA argued in its Opposition to the application of Southwestern Bell Telephone Company ("Southwestern Bell") for authority to originate interLATA traffic within its "in-region State" of Oklahoma, Section 271(c)(1) provides two mutually exclusive means by which its requirements may be met -- the so-called "Track A" and "Track B" compliance vehicles. A BOC seeking "in-region," interLATA authority may proceed under either "Track A" or "Track B", but not both. Moreover, a BOC may not proceed under "Track B," once "Track A" has been triggered by a new market entrant's request to interconnect its network facilities with the network facilities of the BOC. *See* Opposition of the Telecommunications Resellers Association filed in CC Docket No. 97-121 on May 1, 1997; Reply of the Telecommunications Resellers Association filed in CC Docket No. 97-121 on May 1, 1997. Given that Ameritech Michigan has received network interconnection/access requests from multiple carriers that intend to provide local exchange/exchange access services within the State of Michigan as facilities-based

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Michigan relies upon network interconnection/access agreements entered into with Brooks Fiber Communications of Michigan, Inc. ("Brooks Fiber"), MFS Intelenet of Michigan, Inc. ("MFS"), and TCG Detroit ("TCG"), as approved by the Michigan Public Service Commission ("MPSC"), in contending that its Application satisfies the requirements of Section 271(c)(1)(A). Among the issues that must be resolved in addressing Ameritech Michigan's claimed compliance with Section 271(c)(1)(A) are (i) the breadth and depth of the universe of residential and business subscribers the "facilities-based competitor(s)" must be serving; (ii) what qualifies as a competitor's "own facilities;" and (iii) what constitutes "predominant" use of such facilities.

[footnote continued from preceding page]

providers, it must proceed under "Track A," being foreclosed from foreclosed from further reliance upon "Track B."

As TRA emphasized, "Track B" is a narrowly-crafted exception incorporated into the Telecommunications Act solely to protect BOCs from strategic manipulation of the form and timing of local market entry by large interexchange carriers; it is not, as suggested by Southwestern Bell and other BOCs a coequal compliance vehicle. Treating it otherwise would render Congress' inclusion of "Track A" in Section 271 an entirely meaningless act. No BOC would voluntarily submit to the far more demanding requirements of "Track A," if it could proceed under the relaxed "Track B" standard. More tellingly, the BOCs' reading of Section 271(c)(1) would thwart achievement of the Congressional goal of dismantling the local exchange/exchange access "bottleneck" by providing the BOCs with ready access to a market entry vehicle which does not demand as a prerequisite a showing that both competitive entry and the competitive provision of service are in fact possible in their local exchange/exchange access markets; BOCs would instead be able to hide behind paper claims of "competitive checklist" compliance. The BOCs' reading also conflicts with the Congressional preference for negotiated entry by allowing the BOCs to secure "in-region," interLATA authority without having to execute any network interconnection/access agreements. And the BOCs' reading would produce irrational and absurd results. Under the BOCs' interpretation of Section 271(c), monopolists would be allowed to enter competitive markets in which they could utilize their market power to obtain an anticompetitive advantage without first ensuring that the competitive entry into their monopoly strongholds that would be necessary to blunt that market power is indeed possible. Given this approach, the legacy of the Telecommunications Act would not be "the opening [of] all telecommunications markets to competition;" rather it would be one of lost opportunities, coupled with a diminution, instead of an enhancement, of telecommunications competition.

1. The Universe of Residential and Business Subscribers Served by Brooks Fiber, MFS and TCG is Too Limited to Satisfy Section 271(c)(1)(A)

The three competitive LECs identified by Ameritech Michigan in purported satisfaction of Section 271(c)(1)(A)'s requirement that a BOC must be "providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers" between them currently serve less than one percent of the access lines within the State of Michigan.[22] Section 271(c)(1) does not specify the quantity, the mix or the geographic range of residential and business subscribers a facilities-based competitor must serve in order to be found to be providing "telephone exchange service . . . to residential and business subscribers." Ameritech Michigan argues that because Congress did not include a quantitative test, no critical mass of residential and business subscribers facilities-based competitors must be served in order for it to be deemed to be facing facilities-based competition.[23] TRA submits that such a narrow reading would render this critical requirement effectively a nullity and Congress is generally not presumed to engage in meaningless or ineffective acts.[24]

In TRA's view, the requirement that one or more competitive LECs be providing telephone exchange service to residential and business subscribers, like all other preconditions

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[22] "Ameritech Michigan Tries Again for InterLATA Authority, with Status of OSS Likely Focal Point," Telecommunications Reports, Vol. 63, No. 21, p. 3 (May 26, 1997).

[23] Brief in Support of Ameritech Michigan Application at 9, 63 - 64.

[24] *See, e.g.,* Department of Revenue of Oregon v. ACF Industries, 510 U.S. 332, 340 - 41 (1994); Weinburger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961); Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C.Cir. 1976); Wilderness Society v. Morton, 479 F.2d 842, 877 (D.C.Cir. 1973), *cert. denied* 411 U.S. 917 (1974); United States v. Blasius, 397 F.2d 203 (2d Cir. 19968), *cert. denied* 393 U.S. 1008 (1969).

to BOC entry into the "in-region," interLATA market, should be read in light of the key Congressional goals embodied in the telephony provisions of the Telecommunications Act -- *i.e.,* "(1) opening the local exchange and exchange access market to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition."[25] The twin goals of fostering local exchange/ exchange access, and preserving existing interexchange, competition will not be realized unless the preponderance of consumers may obtain their local telephone service from more than one facilities-based provider when BOC entry into the "in-region," interLATA market is sanctioned.

It would trivialize the requirement that a BOC be facing facilities-based competition in the provision of both residential and business service if the universe of consumers served by facilities-based competitors was minuscule. Under the Ameritech Michigan reading of Section 271(c)(1)(A), a BOC would be deemed to have satisfied the requirements of this provision if a single facilities-based competitive LEC any where in the State were serving one residential and one business customer. Grant of "in-region," interLATA authority on the basis of such a showing would hinder, not facilitate, achievement of Congressional goals by eliminating the incentive to permit competitive entry before competition has taken root. Certainly, a statute should not be read to negate its own stated purpose."[26]

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[25] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 3.

[26] New York State Department of Social Services v. Dublino, 413 U.S. 405, 419 (1973); United States v. Broverman, 373 U.S. 405, 408 (1963).

One percent of the residential and business subscribers within the State of Michigan does not constitute the critical mass of subscribers necessary to satisfy Section 272(c)(1)(A) and warrant grant of the relief sought by Ameritech Michigan.

2. Brooks Fiber, MFS and TCG are Not Providing Telephone Exchange Service "Exclusively or Predominantly" Over Their Own Facilities

Ameritech Michigan contends that "[t]he overwhelming proportion of the telephone exchange services provided by Brooks Fiber, MFS and TCG are services that utilize facilities that these competitors have constructed themselves or obtained from third parties, as opposed to services that consist simply of the resold services of Ameritech."[27] Accordingly, Ameritech Michigan asserts that these competitive LECs "all . . . offer local exchange services exclusively or predominantly over their own telephone exchange services facilities," in satisfaction of the requirements of Section 271(c)(1)(A).[28] Among the facilities that Ameritech Michigan categorizes as Brooks Fiber's, MFS' and TCG's "own telephone exchange services facilities," however, are unbundled network elements, including unbundled local loops, obtained by these carriers from Ameritech Michigan.[29] Such a categorization is permissible, according to Ameritech, because given that "Section 271(c)(1)(A) describes only two possible methods of providing service, facilities-based service necessarily encompasses all service other than resold service."[30] TRA disagrees.

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[27] Brief in Support of Ameritech Michigan Application at 11 - 12.

[28] Id. at 10 - 11.

[29] Id. at 10 - 14.

[30] Id. at 12.

In TRA's view, the qualifier "own" as used in Section 271(c)(1)(A) requires either that the facilities over which a competitive local exchange service is provided must either be owned by the competitive LEC or leased from an entity unaffiliated with the BOC with which the competitive LEC is competing. Confirming this assessment are the distinctions drawn by Section 271(c)(1) both between "the network facilities of one or more unaffiliated competing providers" and "[the Bell operating companies] network facilities" to which they are interconnected, and between services provided over the competitor's "own telephone exchange service facilities" and the "resale of the telecommunications services of another carrier." The reference to "another carrier" is obviously not to the BOC with whom the competitive LEC is competing since Section 271(c)(1) also makes reference to "[a] Bell operating company." Hence, even the resale of telephone exchange services which may complement the services provided over a competitive LEC's own facilities may not involve the BOC with which the competitor is competing.

At a minimum, Section 271(c)(1)(A)'s reference to a competitive LEC's own facilities requires facilities over which the competitive LEC may exercise control wholly apart from the BOC with which it is competing and as to which the competitive LEC is not in any way reliant upon the BOC. Clearly then, a competitive LEC is not using its "own" facilities if it is using unbundled network elements obtained from the BOC with which it is competing. Indeed, the Joint Statement drew a sharp distinction between a competitor's network and the "facilities and capabilities (*e.g.,* central office switching) . . . obtained from the incumbent local exchange carrier as network elements pursuant to new section 251."[31]

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[31] Joint Explanatory Statement at 148.

The above understanding of the requirement that a competitor be providing a competitive telephone exchange service over its "own" facilities is consistent with the clear view of Congress that the presence of a facilities-based competitor is an essential component of a competitive local exchange/exchange access market. It belabors the obvious to suggest that to the extent a competitive LEC is reliant upon the BOC with which it is competing for facilities, it remains vulnerable to anticompetitive abuses engaged in by that BOC. In such a circumstance a competitor is dependent upon the BOC for, among other things, provisioning, maintenance and repair, not to mention obligated to pay charges assessed by the BOC. As the Commission has recognized:

> [I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially thesame time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged.[32]

Thus, the Commission has repeatedly drawn distinctions between a competitor's use of an incumbent LEC's unbundled network elements and a competitor's own facilities, recognizing that the former involves greater reliance upon the incumbent LEC.[33]

Ameritech Michigan's suggestion that the Commission's reading of the term "own facilities" as used in Section 214(e)(1)(A) to include unbundled network elements obtained from an incumbent LEC is in conflict with the Commission's consistent treatment of a competing LEC's own facilities as distinct from the unbundled network elements obtained from an

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[32] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 518.

[33] *See, e.g.,* id. at ¶¶ 12, 232, 328, 330, 334, 336, 362.

incumbent LEC is simply wrong.[34] As the Commission itself has recently argued to the U.S. Court of Appeals for the Eighth Circuit, terms need not, and should not, be construed consistently throughout the Telecommunications Act when the contexts in which they are used require different interpretations.[35] Thus, in responding to allegations that it applied different readings to the term "facilities" for purposes of Sections 214(e) and 153(29), the Commission explained:

> The Commission's decision in the Universal Service Order (paras. 151-53) to adopt a narrower, "physical network component" definition of "facilities" under Section 214(e) has no bearing on the reasonableness of the Commission's statutory analysis under Section 153(29). In that different context of defining which carriers are eligible for universal service support, the Commission sensibly explained that a broader definition, such as that suggested by the language of Section 153(2(9), would allow a "pure reseller" whose only "facilities" consisted of a billing office to receive universal service support even though the language of section 214(e) clearly indicated that universal service support should not be available to pure resellers.[36]

The different contexts in which the term "own facilities" is used in Sections 214(e)(1)(A) and 271(c)(1)(A) also support different interpretations.[37] Recognizing that Section 214(e)(1)(A)'s use of the term "own facilities" was ambiguous, the Commission "look[ed] to other sections of the Act and to legislative intent to resolve the ambiguity."[38] On the basis of this

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[34] Brief in Support of Ameritech Michigan Application at 14.

[35] Supplemental Brief of Respondents Federal Communications Commission and United States of America filed in The Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. petition for review filed Sept. 5, 1996) at 15 - 16.

[36] Id.

[37] 47 U.S.C. §§ 271(c)(1)(A), 214(e)(1)(A).

[38] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, ¶ 155 (released May 8, 1997).

analysis, the Commission concluded that treatment of unbundled network elements as a competitive LEC's own facilities for purposes of Section 214(e) was warranted because it was the only reading that was consistent with both the intent of Congress that the use of unbundled network elements be one of three primary paths of entry into local markets and the Federal-State Joint Board's principle of competitive neutrality.[39] As the Commission explained;

> interpreting the term "own facilities" to include unbundled network elements is the most reasonable interpretation of the statute, given Congress's intent that all three forms of local entry must be treated in a competitively neutral manner. . . . If the term "own facilities" is interpreted *not* to include service provided through unbundled network elements . . . a carrier providing service using unbundled network elements would suffer a substantial cost disadvantage compared with carriers using other entry strategies. . . . If we interpreted the term "own facilities" not to include the use of unbundled network elements, the end result would be that the entry strategy that includes the exclusive use of unbundled network elements would be the *only* form of entry that would not benefit from, either directly or indirectly, universal service support.[40]

"[L]ook[ing] to other sections of the Act and to legislative intent to resolve the ambiguity" in Section 271(c)(1)(A)'s use of the term "own facilities" produces a very different result. As discussed above, treating unbundled network elements as a competitive LEC's own facilities for purposes of Section 271(c)(1)(A) would allow entry by a BOC into the "in-region," interLATA market in a State in which it was not facing a competitor that was not reliant upon it for network facilities. "Exclusive use" of a facility is an appropriate indicia of a competing LEC's "own facilities" in the universal service context because the carrier has "paid the full cost of the facility, including a reasonable profit, to the ILEC," and, accordingly, should be entitled

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39 Id. at ¶¶ 155 - 68.

40 Id. at ¶¶ 163, 164, 166 (emphasis in original).

to all benefits associated with the use of the facility.[41] "Exclusive use" of a facility is not an appropriate indicia of a competing LEC's "own facilities" in the context of BOC entry into the "in-region," interLATA market because use of unbundled network elements obtained from a BOC, whether exclusive or not, would leave a competitive LEC vulnerable to anticompetitive manipulation by the BOC of those facilities.

As the Commission has noted, "the word 'own' -- as well as its numerous derivations -- is a 'generic term' that 'varies in its significance according to its use' and 'designate[s] a great variety of interests in property.'"[42] The meaning of "own facilities" must be drawn from its statutory context and interpreted in light of Congressional objectives. Just as the term "own facilities" means something different in Sections 214(e)(1)(A) and 153(29), so too does it mean something different in Section 271(c)(1)(A).

Fortunately, the use of the term "predominantly" in Section 271(c)(1)(A) is far less ambiguous and as such can be interpreted in its ordinary, everyday sense.[43] The term "predominant" means superior, dominating, and predominant. In other words, "predominant" means at least "greater in amount" and generally more than a mere majority.[44] Hence, "predominantly over [a competitor's] own telephone exchange services facilities" means that at

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[41] Id. at ¶ 160.

[42] Id. at ¶ 158 (footnote omitted).

[43] *See, e.g.,* Perrin v. United States, 444 U.S. 37, 42 (1979); Burns v. Alcala, 420 U.S. 575, 579 (1975).

[44] *See, e.g.,* Websters New World Dictionary of the American Language, College Edition., p. 11151 - 52 (1968).

a minimum more than half of the facilities comprising a competitive LEC's network must be obtained from someone other than the incumbent LEC with which the competitor is competing.

While Congress recognized that "it is unlikely that competitors will have *a fully redundant network* in place when they initially offer local service," and that "*some facilities and capabilities* (*e.g.,* central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements,"[45] Congress certainly contemplated that the vast bulk of the facilities would be owned by the competitive LEC. Indeed, Congress made clear that a facilities-based competitor would have to provide the loop facilities used to serve its customers:

> The House has specifically considered how to describe the facilities-based competitor in new subsection 271(c)(1)(A). While the definition of facilities-based competition has evolved through the legislative process in the House, the Commerce Committee Report (House Report 104-204 Part I) that accompanied H.R. 1555 pointed out that meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes. Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated. For example, large, well established companies such as Time Warner and Jones Intercable are actively pursuing plans to offer local telephone service in significant markets. Similarly, Cablevision has recently entered into an interconnection agreement with New York Telephone with the goal of offering telephony on Long Island to its 650,000 cable subscribers.[46]

A competitor without its own loop facilities is not a facilities-based competitor; such a competitive LEC operates a "virtual" not a "physical" network. Subscriber lines are the

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[45] Joint Explanatory Statement at 148.

[46] Id. at 147 - 48 ("This [Section 271(c)] test that the conference agreement adopts comes virtually verbatim from the House amendment.").

ultimate "bottleneck." If a competitor must take loop facilities from an incumbent LEC, it remains entirely dependent on the incumbent LEC for access to existing and potential customers. As such, the competitive LEC remains vulnerable to anticompetitive abuses by the incumbent LEC and thus presents a far less formidable competitive force.

Applying these principles to the Ameritech Michigan Application confirms its failure to comply with the requirements of Section 271(c)(1)(A). If facilities taken from Ameritech Michigan as unbundled network elements are subtracted from the facilities Ameritech Michigan has categorized as Brooks Fiber's, MFS' and TCG's "own facilities," none of the three carriers can be deemed to be currently providing "telephone exchange service . . . to residential and business subscribers . . . predominantly over their own telephone exchange service facilities."[47] It is TRA's understanding, for example, that more than 75 percent of Brooks Fiber's customers are served using unbundled loops obtained from Ameritech Michigan.

C. Ameritech Michigan has Not as Yet Fully Satisfied the <u>14-Point "Competitive Checklist"</u>

A BOC that seeks "in-region," interLATA authority under "Track A" must demonstrate that it is "providing access and interconnection," which access and interconnection must include each of the fourteen items incorporated into the Section 271(c)(2)(B) 14-point "competitive checklist," pursuant to one or more agreements with a Section 271(c)(1)(A) facilities-based competitor[48] Moreover, a BOC will only be deemed to be providing network

[47] *See, e.g.,* Reply of Brooks Fiber Communications' to Ameritech's Answer to Motion to Reopen and to Conduct a Contested Case Hearing, submitted to the Michigan Public Service Commission in Case No. U-111104 on April 14, 1997 (Ameritech Michigan Application, Vol. 4.1, AM-4-004897 - 4914).

[48] 47 U.S.C. § 271(c)(2)(B).

access and interconnection under "Track A" if it has "fully implemented the competitive checklist."[49] Full implementation in turn means that each of the fourteen "competitive checklist" items must be practically available and adequately supported. Practical availability means that each item can be purchased and utilized by a new market entrant throughout the State and in quantities adequate to meet its needs. If a new market entrant is constrained in the geographic locations in which it can operate because "competitive checklist" items are not ubiquitously available, the "competitive checklist" has not been fully implemented. If a new market entrant cannot satisfy the needs of its customers because of inadequate capacity or deficient operational support, the "competitive checklist" has not been fully implemented.

A key principal associated with "competitive checklist" compliance is that the BOC may not rely upon a "Track B" "Statement of Generally Available Terms and Conditions" ("SGATC") to "fill in the gaps" in its "competitive checklist" compliance showing. Two points are critical here. As noted previously, "Track A" and "Track B" constitute mutually exclusive vehicles by which a requesting BOC may justify a grant to it of "in-region," interLATA authority. A BOC seeking "in-region," interLATA authority may proceed under either "Track A" or "Track B", but not both. Moreover, a BOC may not proceed under "Track B," once "Track A" has been triggered by a new market entrant's request to interconnect its network facilities with the network facilities of the BOC. Thus, once a request for network access/interconnection has been received, a BOC may not demonstrate "competitive checklist" compliance" in partial reliance upon a SGATC.

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[49] 47 U.S.C. § 271(d)(3)(A)(i).

Confirming this view, each reference to "Track A" and "Track B" in Sections 271(c) and 271(d)(3) is couched in the disjunctive, clearly dictating that, depending upon the circumstances, a BOC may rely upon one or the other, but not both. It is well settled that use of the disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately.[50] As clearly stated in the Conference Committee Report:

> a BOC must satisfy the "in-region" test by virtue of the presence of a facilities-based competitor or competitors under new section 271(c)(1)(A), *or* by the failure of a facilities-based competitor to request access or interconnection (under new section 251) as required under new section 271(c)(1)(B).[51]

More tellingly, however, it would make no sense to freely substitute "Track B" compliance for "Track A" compliance because "Track A" constitutes a far more exacting entry vehicle than does "Track B." Even under the most relaxed interpretation, "Track A" requires the presence of at least one operational facilities-based competitors. Under "Track B," no competitive entry need have occurred. Under "Track A," a BOC must actually be providing access and interconnection; under "Track B," it is sufficient that a BOC simply offer to provide such access and interconnection. Under "Track A," the fourteen items comprising the "competitive checklist" must have been fully implemented; under "Track B," "competitive checklist" items must only be included in a SGATC. In other words, even under a liberal reading of "Track A," a BOC must document that economic, technical and operational barriers to market entry have been removed and that competitive entry is not only possible, but has actually

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50 *See, e.g.,* United States v. Behnezhad, 907 F.2d 896, 898 (9th Cir. 1990); Quindlen v. Prudential Ins. Co. of America., 482 F.2d 876, 878 (5th Cir. 1973).

51 Joint Explanatory Statement at 147 (emphasis added).